Supreme Court
MAY
MICHAEL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1403

PETER W. WEBER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No.

PETER W. WEBER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

TO THE HONORABLE WARREN E. BURGER, Chief Justice of the Supreme Court of the United States and the Associates Justices of the Supreme Court of the United States:

This is a petition by Peter W. Weber for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit entered in the above case.

I. OPINIONS DELIVERED IN COURTS BELOW

The opinion of the District Court is not reported, however, a copy of the oral decision is set forth in the addendum hereto. The Court of Appeals did not write an opinion, however, the fact of affirmance is set forth in the addendum hereto.

II. JURISDICTIONAL STATEMENT

The date of the judgment sought to be reviewed is February 7, 1975 and the time of its entry is February 7, 1975. The statutory provision, believed to confer on this court jurisdiction to review the judgment in question, is section 1254 of Title 28 of the United States Code.

III. QUESTIONS PRESENTED

The questions presented for review are:

1. Was the Petitioner denied his right under the Fifth Amendment to be indicted by a Grand Jury where the particular Grand Jury which returned the indictment had been selected under a procedure where there was a systematic exclusion of women?

2. Is there a waiver by a defendant of his constitutional right under the Fifth Amendment to challenge the composition of a grand jury where no express waiver of such right is found, where no consultation between the defendant and his attorney is had with respect to either exercising or waiving such challenge, where defendant does not knowingly or intelligently bypass his right to assert the privilege or where no deliberate choice is made as to whether or not to challenge the composition of the grand jury?

3. Is a defendant entitled, under 28 U.S.C. 2255, to an evidentiary hearing to demonstrate (a) the illegality and unconstitutionality of the grand jury composition (b) the lack of waiver by defendant of his right to challange the composition of the Grand Jury (c) that the doctrine of retroactivity does not deny defendant the benefit of *United States v. Zirpolo*, 450 F.2d 424 (3rd Cir. 1971), and (d) if a waiver of the right is found, that sufficient cause exists to warrant relief under *Rule* 12(b)(2) F.R.C.P?.

4. Was the petitioner denied due process of law as a result of the cumulative effect of a series of trial errors; and is petitioner entitled to raise the issue under 28 U.S.C. 2255 of the effect of cumulative trial errors where the specific issue was not raised on direct appeal, but where a few of the alleged trial errors were individually considered and rejected as requiring a reversal of petitioner's conviction?

IV. STATUTES INVOLVED

The statutes of the United States, which are involved are 28 U.S.C. 1861 and 28 U.S.C. 2255, which statutes are set forth in their entirety in the addendum.

V. STATEMENT OF CASE

The proceedings below were instituted by Petitioner upon a Petition and Motion to vacate sentence pursuant to 28 U.S.C. 2255 before the sentencing court. Petitioner was indicted on July 25, 1967, by a Federal Grand Jury in the District of New Jersey and was convicted after trial in the same District on June 7, 1969 and sentenced by the same Court on September 15, 1969, to a term of 10 years and a fine of $30,000. All direct appeals from that conviction both to the Court of Appeals for the Third Circuit and the United States Supreme Court have been exhausted.

The Petition and Motion to Vacate Sentence pursuant to 28 U.S.C. 2255 was filed below on January 4, 1972

(Pa5).* A judgment denying all relief sought therein was entered by the District Court on April 29, 1974, (Pa12) and a Notice of Appeal was filed on June 27, 1974 (Pa18).

On February 7, 1975 the Court of Appeals for the Third Circuit affirmed the judgment of the District Court by an Order and without issuing an opinion (Pa19).

On July 25, 1967, a United States Grand Jury for the District of New Jersey returned indictments numbered 321 and 322 of the 1967 Term against Peter W. Weber. The Grand jury that returned these indictments was the same grand jury that returned the indictment in *U.S. v. Zirpolo, et al.*, which was ultimately dismissed by the Third Circuit Court of Appeals in *U.S. v. Zirpolo*, 450 F.2d 424 (3d Cir. 1971) on February 19, 1971.

Following the return of the indictments against Mr. Weber and against the defendants in the *Zirpolo* case, both cases were tried before the same judge, the Honorable Reynier J. Wortendyke, in the District of New Jersey. The *Zirpolo* trial preceeded the one against Mr. Weber.

Mr. Weber's trial commenced on April 15, 1969, upon Indictment No. 321-67 which consolidated certain counts of each indictment originally returned against him pursuant to a pretrial order of the Court.

The underlying subject matter of both the Weber indictments and the Zirpolo indictment dealt with the construction of the New Jersey segment of the Colonial transcontinental pipeline project.

Among the many pretrial motions filed in the *Zirpolo* case, one sought dismissal of the indictment therein on the grounds that during the process involved in the selection of the particular grand jury, women were systematically excluded in numbers unequal to their proportion to the population in the State of New Jersey. This particular motion was specifically argued before Judge Wortendyke by comparing population figures with the ration of men to women actually used in the selection process. The motion was denied by the trial court on August 2, 1968. Ultimately, after conviction, the Third Circuit Court of Appeals reversed on February 18, 1971, on the grounds that the procedure employed in the selection of the grand jury was in direct violation of the 1957 Civil Rights Act (28 U.S.C. 1861, et seq.). See, *U.S. v. Zirpolo, supra.*

*All references are to Petitioner's Addendum.

Among the many pretrial motions addressed to both indictments against Weber was one which, in part, sought dismissal of the indictments on the ground that the grand jury which returned them was not legally constituted. Weber's counsel elaborated upon this illegality in a pretrial brief by arguing that since the investigation before the grand jury took so long, it was doubtful if all its members heard all of the evidence at the same time and that hence, a review of the minutes was necessary to determine if the indictment was properly returned. No argument oral or otherwise was asserted by counsel with regard to the disproportion of the number of women to men in the selection process. Admittedly, other than the above stated motion, no separate or specific motion challenging the array of the grand jury on grounds similar to those advanced in *Zirpolo* was ever argued by Weber's attorneys prior to trial. The *Zirpolo* pretrial motions were denied by Judge Wortendyke on August 2, 1968. The Weber pretrial motions were denied by Judge Wortendyke on September 23, 1968.

At no time prior to or during the trial did counsel for Weber ever consult with him with regard to his waiving his right to challenge the grand jury selection process. At

no time did Weber ever waive this right nor did he ever, in consultation with his attorneys, deliberately choose to bypass this right for strategic or other purposes.

The trial of the *Zirpolo* case before Judge Wortendyke preceeded the Weber trial in 1969 and resulted in the conviction of the defendants. Weber was convicted on June 7, 1969, and sentenced on September 15, 1969.

Weber filed his notice of appeal to the Third Circuit on September 16, 1969. It is admitted that among the grounds asserted on that appeal, Weber's counsel did not include a challenge to the array of the grand jury similar to the challenge asserted in the *Zirpolo* case. Once again, Weber's attorneys on appeal did not consult with him regarding any waiver of his right to challenge the selection process nor was there any intentional bypass of his right to do so. Weber's appeal was decided by the Third Circuit Court on December 30, 1970. *U.S. v. Weber,* 437 F.2d 327 (3d Cir. 1970). *Zirpolo* was decided by the same Court on February 19, 1971. Weber's attorneys petitioned the United States Supreme Court for a Writ of Certiorari which was denied on April 26, 1971, *U.S. v. Weber,* 402 U.S. 932 (1971).

Subsequent to the denial of the Writ of Certiorari, Weber's attorneys filed a motion with the Third Circuit Court for leave to file a second petition for rehearing asserting a challenge to the array of the grand jury on grounds similar to those advanced in the *Zirpolo* case.

On May 27, 1971, the Third Circuit Court denied Weber's motion on the ground that the challenge to the array was never specifically asserted by Weber before the trial court.

Thereafter, counsel for Weber filed a motion before the trial court seeking an evidentiary hearing to establish

facts relative to the pretrial motion to dismiss upon the original grounds, namely, that the grand jury was not legally constituted. This motion was dismissed without hearing by order dated June 11, 1971.

The indictments returned against Mr. Weber dealt with various alleged and unrelated charges occurring during the course of construction of the New Jersey segment of the Colonial transcontinental pipeline. The Colonial Pipeline Company was the owner of the pipeline project and contracted out the actual work. The H. C. Price Company was one of the bidders as general contractor on the project. The Bechtal Corporation was the successful bidder as general contractor. The Osage Construction Company and the Napp-Grecco Corporation contracted directly with the Colonial Pipeline Company for certain work on the project. The Joyce Pipeline Company performed some of the subcontract work under the Bechtal contract.

Petitioner was tried on consolidated Indictment 321-67 which included 8 counts. The first four Counts alleged violations of 29 U.S.C. 186(b)(d). Aside from varying dates, each charge is the same in that it alleged that Weber, Business Manager of Local Union 825, International Union of Operating Engineers, unlawfully received four separate payments of $3,500.00 from the H. C. Price Company, an employer of members of that union. The fifth Count alleged a violation of 18 U.S.C. 1951 in that Colonial Pipeline was allegedly forced by Weber to withdraw a contract from Osage Construction Company and award it to Napp-Grecco Corporation. The sixth Count charged a violation of 18 U.S.C. 1951, in that Weber and certain named co-conspirators combined to force Bechtel Corporation to award a subcontract to Joyce Pipeline Company and James V. Joyce, an alleged co-conspirator. Count

Seven, under 18 U.S.C. 2 and 1951 charged the success of the endeavors alleged in the previous count. The eighth Count sets forth a conspiracy under 18 U.S.C. 371 to violate 29 U.S.C. 186(a)(b) in that Weber took money from Joyce and his agent to use his position to extort a subcontract from Bechtel Company for Joyce.

The testimony adduced from the government's witnesses in support of the first four Counts was that first in order to get Peter Weber's help in getting an award of a contract to build the pipeline segment in New Jersey, and later to assure peace on other New Jersey jobs, the H. C. Price Company paid Weber, at his insistence, $3,500.00 in cash on four separate occasions. The vehicle of delivery was said to be one Roy Burgess, assistant to the vice-president of H. C. Price Company in charge of pipeline construction, who died before the trial. The basic testimony in this regard was hearsay from witnesses Price, Overton and Allshouse which was admitted, over Weber's objections, on grounds that it came within a special exception to the hearsay exclusionary rules. There was also testimony that Weber was seen in the company of Roy Burgess, on and off job sites, one phone call from Weber to Glenn H. Giles of Colonial and one to Harold Price of the Price Company. There was no direct testimony as to the existence of a conspiracy involving the Petitioner nor as to the passage of any money to the Petitioner, Weber.

Counts VI, VII and VIII dealt with a subcontract allegedly obtained from the Bechtel Corporation by the Joyce Pipeline Co. and various payments made to Weber all allegedly through the illegal and improper activities of Peter Weber and certain co-conspirators. There was testimony as to some history of bad feelings between Weber and Bechtel; of meetings between Weber and Bechtel and Colonial representatives and a work stoppage on the job.

In addition, certain Bechtel officers testified that they had subcontracted certain work to the Joyce Construction Company which they had originally intended to do themselves in the hope that it would bring labor peace.

James V. Joyce, named as a co-conspirator but not a co-defendant on these counts, testified on behalf of the government as to the existence of a conspiracy and payments he alleged that he made to Mr. Weber.

Peter Weber was compelled, by virtue of the consolidation, to testify in his own behalf. He established that he was President and Business Manager of Local 825, Operating Engineers. He testified to his background in the labor movement and how he rose through the ranks of Local 825 to become Business Manager in 1953 and President in 1964. He spoke of the diverse works in which his union was engaged and the miniscule percentage of it which was directed to pipeline construction. He described the nature of his work as basically liaison between his men and the contractors, numbering in the thousands, dealing with problems as they arise, day or night and wherever he happened to be. He issued a blanket denial of any wrongdoing.

As to Counts I, II and III, he testified with extreme brevity. He was, however, extensively cross-examined on these charges as well as the others and on his business and personal history dating back to approximately 1945. Petitioner was convicted on Counts I, II, III, VI, VII and VIII and acquitted on Counts IV and V.

Weber's motions for a judgment of acquittal and a new trial were denied.

On September 12, 1969, appellant was sentenced by the Hon. Reynier J. Wortendyke, J., U.S.D.J., as follows: Count I—$10,000 fine, sentence of imprisonment suspended; Count II—$10,000 fine, sentence of imprisonment suspended; Count III—$10,000 fine, sentence of imprisonment suspended; Counts VI and VII, imprisonment for ten (10) years to run concurrently; Count VIII, imprisonment suspended, no fine imposed.

The motion and petition to vacate sentence which is the subject matter of the present appeal was filed with the Clerk of the United States District Court for the District of New Jersey on January 4, 1972. The relief sought in the petition was denied by the District Court, after oral argument, by order filed April 29, 1974. Notice of Appeal was filed on June 27, 1974.

The District Court rendered its opinion setting forth its reasons for the denial of the petition on March 11, 1974, in the absence of counsel for both parties.

VI. REASONS RELIED ON FOR ALLOWANCE OF WRIT

A. The decision of the Court of Appeals, which merely affirms without opinion the decision of the District Court, permits a finding to stand under the purported authority of *Davis v. United States*, 411 U.S. 233 (1973) in a way in conflict with this Court's rationale in the *Davis* case and in *Shotwell Mfg. v. United States*, 371 U.S. 341 (1963).

It is claimed that petitioner did not waive his right to challenge the jury selection process and seeks a hearing to establish such a non-waiver. The lower courts have used the *Davis* case, *supra*, as authority for not granting the hearing.

In the *Shotwell* case, *supra*, the defendants were convicted of tax evasion in 1953. On appeal the convictions were reversed and a new trial ordered by a divided Court of Appeals on the ground that the District Court should have suppressed certain evidence furnished to the Government by the defendants. The Government petitioned for Certiorari. During its pendency, the Solicitor General moved for a remand of the suppression issue to the trial court based on newly discovered evidence. The Supreme Court vacated the judgment of the Court of Appeals and remanded the matter to the trial court. In March, 1958, *four years after trial*, defendants filed an amended motion challenging the array of the original grand and petit juries. The defendants alleged that both juries were illegally constituted because the jury commissioner had delegated his selection duties to one of his private employees; that volunteers were allowed to serve and the Clerk of the District Court failed to employ a selection process designed to insure a proper cross-section of the population. The District Court conducted a full evidentiary hearing and

concluded that the selection process was open and notorious and available to defendants in the exercise of due diligence before trial. The acceptance of volunteers had received publicity in the newspapers. The defendants conceded that Rule 12(b)(2) barred their application with regard to the grand jury and only denied that it applied to their motion relative to the petit jury. The District found, *after full hearing*, that defendants had waived their rights to assert the challenge because of the long delay pursuant to Rule 12(b)(2) and found no prejudice. This finding was sustained on appeal.

In the Davis case, *supra*, the petitioner, Davis, a Negro, and two white men were indicted for entering a federally insured bank with intent to commit larceny. The only pretrial motion made by Davis was one to quash his indictment on the ground that it was the result of an illegal arrest. His pre-trial motions were decided by the court on the day of the trial. Davis was convicted and sentenced to 14 years in prison. That conviction was affirmed on appeal. Apparently, several post-conviction motions were made thereafter by Davis, but none of them included a challenge to the array of the grand jury. All motions were denied. *Three years after his conviction*, Davis filed another motion to vacate sentence pursuant to 28 U.S.C. Sec. 2255 wherein he sought dismissal of the indictment on the ground that the District Court employed the "key man" system of grand jury selection and thereby systematically excluded qualified Negroes. His challenge was limited only to the array of the grand jury. The District Court took no evidence below, but invited additional briefs on the question of waiver. In denying the motion, the District Court relied upon the *Shotwell* case, *supra*, and concluded that the petitioner had waived his right to object to the composition of the grand jury pursuant to

Rule 12(b)(2). The District Court also found that the "key man" method of selection of grand juries had been openly followed in that particular district. In addition, the District Court found that since the same grand jury that indicted the petitioner had also indicted his two white accomplices and since the case against the petitioner was a strong one, that there was nothing in the facts of the case to warrant relief under Rule 12(b)(2) for "cause shown." The Court of Appeals affirmed on the basis of *Shotwell* and Rule 12(b)(2). The Supreme Court affirmed.

In the *Shotwell* case, despite the passage of time, the District Court nevertheless, conducted a full evidentiary hearing on questions of the selection process, waiver, and prejudice.

The defendant in the *Davis* case filed several motions for post-conviction relief which were all denied prior to his filing the particular post-conviction application which challenged the array of the grand jury.

In both *Shotwell* and *Davis*, the lower courts found that the method of selecting juries was open and notorious, and in *Shotwell*, that it was the subject matter of newspaper publicity. In the present case, the lower court denied an evidentiary hearing as to all issues. The District Court made no finding that the method of jury selection was open and notorious and merely denied the application on the basis of Rule 12(b)(2). There was no evidence that the selection process employed in the instant case was open and notorious. There was no evidence that Weber intentionally bypassed his right to challenge the array of the grand jury. There is evidence that while Weber was involved in the direct appeals from his conviction, he first learned of the method of grand jury selection as a result

of the Third Circuit Court of Appeals decision in the *Zirpolo* case, *supra.* Immediately upon learning these facts, his attorneys filed a motion for a second re-hearing before the Third Circuit Court of Appeals. When that was denied, Weber sought an immediate evidentiary hearing before the trial court which was also denied.

The affidavit of Weber filed herein (Pa10) states that at no time during the pretrial or trial did defendant's counsel ever consult with him in relation to waiving the objection to the selection of the grand jury panel in relation to discrimination based on sex. The affidavit further states that at no time did the defendant, by any act, waive his right to object to the selection process of the grand jury predicated on its discrimination in relation to sex. Furthermore, the affidavit clearly indicates that the record is barren of any affirmative action by Weber or his counsel in waiving or intentionally bypassing his right to object to the selection process of the grand jury in relation to discrimination based upon sex.

Weber is entitled to a presumption against the waiver of his constitutional rights.

In the present case, counsel for Weber had filed a pretrial motion in which he asserted that the grand jury was not legally constituted. The basis of this original motion on counsel's part apparently did not seek a challenge to the array similar to the one made in *Zirpolo, supra.* This was done without consulting Weber. After the Third Circuit affirmed Weber's conviction and the United States Supreme Court denied Certiorari, his then counsel who had not been his attorney at the pretrial stage, filed a motion to permit a petition for a rehearing out of time, alleging that Weber's case came within the umbrella of retroactivity of the Third Circuit's decision in *United States v.*

Zirpolo, supra, relying upon the original motion challenging the legality of the grand jury. (In *Zirpolo, supra,* the Third Circuit held that it's decision would be retroactive to those cases in which a timely and proper motion had been made attacking the selection process of the grand jury). The Third Circuit dismissed Weber's motion to file a second petition for a rehearing out of time on the ground that, on review of the record, it did not find that a specific motion was made at the trial attacking the grand jury selection process because of discrimination in relation to sex. Following this decision of the Third Circuit, Weber filed a motion before the trial court to conduct an evidentiary hearing for the purpose of taking testimony as to the facts and circumstances surrounding the hearing and disposition of his counsel's original motion in which he alleged that the grand jury was not legally constituted. This motion was denied without a hearing by the court on the ground that the Third Circuit had decided as a matter of fact that a specific motion was not made attacking the selection process of the grand jury based upon discrimination in relation to sex.

B. The decision of the Court of Appeals contained in a Judgment Order without opinion, permits an erroneous holding to stand, namely that the issue of a violation of due process as a result of cumulative trial errors was raised on the direct appeal and thus could not be collaterally raised in a proceeding under 28 U.S.C. 2255. This issue was *not* raised on direct appeal and the lower court's decision thereon contravenes this Court's holding in *Kaufman v. United States,* 394 U.S. 217 (1969).

The Government argued below that this Point had been raised on the original appeal following conviction from the concluding language of the Court in *U.S. v. Weber, supra,* at 340. that, "Since we have examined all

the errors alleged by Weber and have found no impermissible procedures, we cannot agree that viewing the trial in its entirety reveals a deprivation of due process."

Despite this language, the argument advanced under this specific point was never raised in the original appeal.

On direct appeal a few of the trial errors were presented as requiring, upon individual consideration, a reversal of the conviction. This, the Court of Appeals declined to do. *United States v. Weber*, 437 F.2d 327 (3rd Cir. 1970).

Petitioner now raises as a separate and distinct issue, the point that the cumulative effect of the multiplicity of trial errors constituted a violation of due process under the Fifth Amendment to the United States Constitution. The District Court below, and as affirmed by the Court of Appeals, failed to recognize the new issue and denied relief to petitioner on the mere statement of "collateral attack."

As illustrative of the type of error is the unlimited and prejudicial cross-examination of the Petitioner.

During the course of his direct examination, Weber was asked if anyone took care of him in the period of 1959 to 1960 to which he replied, "My membership." On the theory that the question and the response indicated that Weber had no other outside interests other than his union position, the Government was permitted to cross-examine Weber on all other business interests which he may have had unrelated to union work covering a period from 1944 down to virtually the time of the trial. Using this as a basis from which to affect his credibility, the Government was permitted through an abuse of trial discretion in covering a vast period of time and a variety of interests which

Weber may have held to attempt to show that he cared little or nothing about this union membership.

The Court permitted, over timely objection, the Government to cross-examine the defendant by pointing out alleged prior inconsistent statements made by the defendant when being questioned by Robert Kennedy before a Senate Subcommittee on January 29, 1958, relative to the defendant's interest in a beer distributorship. The Government sought to elicit from petitioner any other business interests he may have had from the period 1950 through 1960. Counsel for the defense objected and it was pointed out to the Court that the question posed by the Government would seek to elicit Weber's interests in a company known as Public Constructors Corporation and his relationship with a Mr. Ray Fisher who was President of the company. In 1962, Weber had been jointly indicted with Fisher for various violations of 18 U.S.C. 186 in that he received things of value in the form of the use of various credit cards held by an employer of his membership. That indictment remained open as Weber had never been tried for the charges. The Government sought to question Weber with regard to the allegations contained in the 1962 indictment on the theory of affecting his credibility despite the fact that the great prejudice which resulted far outweighed the value of receiving this evidence. After the Court overruled the defense objection, the Government was permitted to pursue this line of questioning. The Court, over objection, allowed the Government to question Weber as to the manner in which he invested in this company in either 1950 or 1951.

The Court even allowed cross-examination as to the business interests of Weber's brother, Walter, and brought out the fact that the brother had an interest in the build-

ing in which the union held its meetings, despite defense objections.

The formation of Public Constructors and the manner and method by which Weber maintained an interest in that company were allowed to be fully explored by the Government.

Cross-examination was further permitted of Weber with regard to his interest in a company known as Jersey Equipment and how he obtained same.

The Court denied a motion for a mistrial on the theory that the Government was permitted to examine Weber relative to the details and issues raised by the 1962 indictment. The Government sought to introduce a Florida hotel bill in the sum of $115.10 which was paid through the use of a credit card of Public Constructors. The Government was permitted to examine him as to whether or not he had credit cards of Public Constructors. Clearly this line of questioning had nothing to do with the indictment for which Weber was being tried, but was solely and exclusively related to the 1962 indictment for which he never had been tried.

The government was permitted to examine Weber as to whether or not in 1959 he made use of Public Contractors credit card in the State of Florida. Public Constructors and Public Contractors were separate companies formed by the same people and both were subject matters of the 1962 indictment.

The Government was permitted to ask "So that you represented the men in your union capacity and owned in part the firm for which they worked?" which clearly was related solely to the 1962 indictment.

The Court permitted the Government to fully explore the sinking of Weber's boat on May 6, 1973. The original cost of the boat in the sum of $17,500 was permitted. A motion for a mistrial was made on behalf of Weber on the grounds that the exhaustive examination permitted the Government, with regard to the 1962 indictment served, to prejudice the defendant in the eyes of the jury beyond repair and on the further ground that the Court made a remark in the presence of the jury relative to Weber's duality of representing contractors as well as union men in justifying the Government's right to so cross-examine. Exhaustive questioning was permitted relative to the sinking of Weber's boat in 1963 and as to the cost of labor in raising the boat. The Government was further allowed to question Weber as to the fact that he claimed illness in 1959 when he appeared before the United States Senate Subcommittee.

Petitioner contends that the trial court permitted cross-examination into areas totally unrelated to the charges contained in the indictments, and which cross-examination covered a period of approximately 20 years.

The foregoing is presented as an example of only one of the several prejudicial trial errors. It is the multiplicity of such errors which is deemed to deny petitioner due process of law.

VII. CONCLUSION

Wherefore, the petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit in the above entitled case.

STEIN, BLIABLIAS, GOLDMAN
& McGUIRE
Attorneys for Petitioner

By: /s/ Dino D. Bliablias
DINO D. BLIABLIAS

ADDENDUM A

28 U.S.C. 2255

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or corect the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

ADDENDUM B

28 U.S.C. 1861

"It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district of division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose."

ADDENDUM C

Order of Court of Appeals, May 27, 1971

Upon consideration of appellant's motion for leave to file a second petition for rehearing out of time, and the opposition by appellee, all in the above entitled case; and

Whereas, on December 30, 1970, the Court affirmed the judgment of the District Court in this case; on February 3, 1971, appellant's first petition for rehearing was denied; on April 26, 1971, the Supreme Court denied appellant's petition for a writ of certiorari; and upon consideration of the record it appears the allegation of error raised by the second petition for rehearing out of time was not specifically assreted by appellant in the District Court,

It is ordered that appellant's motion for leave to file a second petition for rehearing out of time be and the same is hereby denied, and that the mandate shall issue forthwith.

BY THE COURT

/s/ Arlin M. Adams

May 27, 1971

ADDENDUM D

Motion and Petition to Vacate Sentence Pursuant to 28 U.S.C.A. 2255

(Filed January 4, 1972)

Defendant shows to this Court as follows:

1. On June 7, 1969, the defendant was convicted of 6 counts on Indictment No. 321-67, in the United States District Court. The convictions were predicated on indictments returned by a Federal Grand Jury impaneled in Newark and filed on July 25, 1967, and consolidated by the District Court prior to trial.

2. On June 14, 1971, the defendant, pursuant to the mandate of this Court, was taken into custody by the United States Marshall and is presently in custody of Lewis J. Gengler, Warden of the Federal Detention Center, West Street, New York, New York.

3. The cause of the detention and restraint of defendant's liberty is the mandate of the Third Circuit Court of Appeals issued May 27, 1971, which affirmed the conviction of Peter W. Weber on Indictment No. 321-67, and upon which the defendant Peter W. Weber was sentenced to a term of 10 years in the Federal Penitentiary.

4. (a) Said detention and restraint is unlawful in that the Grand Jury which returned the said indictments against the defendant Peter W. Weber, upon which the subsequent convictions were predicated, was improperly selected and convened in contravention of the defendant's rights under the Fifth Amendment of the Constitution of the United States in that women were systematically excluded and discriminated against in the selection process of the said Grand Jury.

4. (b) Said detention is further unlawful in that the defendant was deprived of the right to confront the main witness against him in violation of the Sixth Amendment to the United States Constitution.

4. (c) Said detention is further unlawful in that the defendant was effectively denied his right to remain silent in violation of the Fifth Amendment to the United States Constitution by virtue of the prejudicial joinder of two indictments into the consolidated Indictment No. 321-67 under which defendant was tried.

4. (d) Said detention is further unlawful in that the defendant was denied his right to trial by an impartial jury in violation of the Sixth Amendment to the United States Constitution.

4. (e) Said detention is further unlawful in that defendant was deprived of his liberty without due process of law in violation of the Fifth Amendment to the United States Constitution by virtue of the cumulative prejudicial effect of numerous trial errors.

5. On December 30, 1970, the Third Circuit Court of Appeals affirmed the judgment of conviction of the District Court. On February 3, 1971, appellant's first petition for a rehearing was denied. On April 6, 1971, the United States Supreme Court denied applicant's petition for a writ of certiorari.

6. Subsequent to the denial of the writ of certiorari by the United States Supreme Court the defendant's motion for permission to file a second petition for rehearing out of time was dismissed on May 27, 1971.

7. Subsequently the defendant filed a motion with the United States District Court for an evidentiary hearing concerning the facts and circumstances surrounding defendant's motion that the Grand Jury which returned the indictment against him was not legally constituted which motion was denied on June 11, 1971.

8. The defendant Peter W. Weber requests a hearing to present evidence as to the following issues:

(a) The issue of constitutionality of the Grand Jury selection procedure.

(b) The issue of whether defendant Peter W. Weber waived his constitutional rights under the Fifth Amendment to challenge the selection procedure of the Grand Jury which returned the indictments against him.

9. At the hearing the defendant Peter W. Weber will offer proof as to the following facts:

(a) The selection procedure of the Grand Jury which returned Indictments No. 321-67, 322-67, systematically and arbitrarily excluded women from Grand Jury service notwithstanding the fact that women constituted an identifiable class or group eligible for jury service in the community;

(b) At no time either prior to the trial of Indictments No. 321-67, 322-67, or during the trial of said Indictments did defendant Peter W. Weber waive his constitutional right under the Fifth Amendment to challenge the fact that there was a systematic exclusion of and discrimination against women in the selection process of the Grand Jury which returned the indictments against him;

(c) At no time prior to the trial of Indictments No. 321-67, 322-67, or during the trial of said indictments, did any of defendant Peter W. Weber's counsel ever consult with him with regard to waiving the privilege of asserting his constitutional right to challenge the fact that the selection process of the Grand Jury which indicted him systematically excluded and discriminated against women;

(d) At no time prior to the trial of the Indictments No. 321-67, 322-67, or during the trial of said Indictments did the defendant Peter W. Weber intelligently and knowingly deliberately bypass his right to assert a constitutional challenge to the selection process of the Grand Jury on the ground that the Grand Jury systematically excluded and discriminated against women in its selection process.

10. This Court should require defendant's production at the hearing of this motion because there are substantial issues of fact as to events in which defendant participated.

STEIN, BLIABLIAS and
GOLDMAN

By: /s/ Dino D. Bliablias
DINO D. BLIABLIAS

STATE OF NEW YORK)
SS:
COUNTY OF NEW YORK)

PETER W. WEBER, of full age, being duly sworn acaccording to law upon his oath deposes and says:

I am the defendant in the above entitled matter. I have read the contents of the motion and petition herein and the same are true.

/s/ Peter W. Weber
PETER W. WEBER

Sworn to and subscribed
before me this 22nd day
of December, 1971.

/s/ Paul P. Lefebre
PAUL P. LEFEBRE
Parole Officer

Federal Detention Hdqtrs.
427 West Street
New York, N. Y.

"Authorized by the Act of July 7, 1955
to administer oaths (18 U.S.C. 4004)."

ADDENDUM E

Affidavit of Peter W. Weber

STATE OF NEW YORK :
SS
COUNTY OF NEW YORK:

PETER W. WEBER, of full age, being duly sworn upon his oath deposes and says:

1. I am the defendant in the above matter.

2. I have read the allegations contained in the Motion and Petition to Vacate Sentence under #28 U.S.C.A. 2255 and state that the same are true.

3. During the pre-trial and trial proceedings of Indictments 321-67, 322-67 I was represented by the following counsel:

a) Arthur Breitkopf, Esq., 790 Broad St., Newark, N. J.

b) Dino Bliablias, Esq., 11 Commerce St., Newark, N. J.

c) Joseph A. Hayden, Esq., 744 Broad St., Newark, N. J.

4. At no time, either prior to the trial of Indictment No. 321-67, 322-67, or during the trial of said Indictments, did I waive my constitutional right under the Fifth Amendment to challenge the fact that there was a systematic exclusion of and discrimination against women in the selection process of the Grand Jury which returned the indictment against me.

5. At no time prior to the trial of Indictments No. 321-67, 322-67 or during the trial of said indictments, did any of the foregoing counsel, or any other counsel, ever consult with me with regard to waiving the privilege of asserting my constitutional right to challenge the fact that the selection

process of the Grand Jury which indicted me systematically excluded and discriminated against women.

6. At no time prior to the trial of the Indictments No. 321-67, 322-67, or during the trial of said indictments did I intelligently or knowingly or deliberately bypass my right to assert a constitutional challenge to the selection process of the Grand Jury on the ground that the said selection process of the Grand Jury systematically excluded and discriminated against women.

/s/ Peter W. Weber
PETER W. WEBER

Sworn to and subscribed before me
this 6th day of July, 1971.

/s/

ADDENDUM F

Opinion of District Court

THE COURT: Plaintiff Weber has filed a petition pursuant to 28 U.S.C. 2255 to vacate his sentence imposed originally by Judge Wortendyke, which was left undisturbed by this Court upon later application to reduce.

Originally, Weber was indicted by the Grand Jury on two indictments charging him with violations of the Taft-Hartley Act, 29 U.S.C. 186(b) and the Hobbs Act, 18 U.S.C. § 1951. The indictments were consolidated and on June 7, 1969 Weber was convicted on six of the eight counts set forth in the consolidated indictment. Judge Wortendyke sentenced hi mto a prison term of ten years and fined him $10,000.

Subsequently, the Court of Appeals for the Third Circuit affirmed his conviction and on February 3, 1971 denied his first petition for a rehearing, *U.S. v. Weber*, 437 F.2d 327 (3d Cir. 1970), *cert. denied* 402 U.S. 932 (1971).

Shortly thereafter, the Third Circuit Court of Appeals in *United States v. Zirpolo*, 450 F.2d 424 (3d Cir. 1971) reversed the convictions of the defendants on the basis that the Grand Jury which indicted in that case was improperly constituted by reason of sex discrimination.

Apparently, upon learning of the *Zirpolo* decision, Weber filed a second petition for rehearing alleging the Grand Jury was improperly constituted, which was denied. In that denial the Court of Appeals indicated that the grounds upon which the second petition for rehearing was based was not specifically asserted in the District Court. On June 2, 1971, Weber filed a motion in District Court before Judge Wortendyke for an evidentiary hearing on the composition of the Grand Jury, which Judge Wortendyke denied on June 11, 1971. This denial was never appealed by Weber.

It is clear that unless this application was made before the trial court, Weber could not assert it later. In *Zirpolo*, the Court of Appeals limited the retroactivity of its decision to, "those cases in which proper and timely challenges to the Grand Jury selection procedure were made and on which trials have not been had or, if trials have been completed, are on direct appeals on this date." 450 F.2d at 433.

On October 24, 1967, Arthur Breitkopf, Esq., then representing Peter W. Weber and others, moved the District Court for, among other things, a dismissal of the indictment on the grounds that, "the Grand Jury returning this indictment was not legally constituted, that the indictment was not founded upon the concurrence of twelve or more jurors who were present for the taking of all evidence presented and, therefore, an inspection of the Grand Jury minutes is mandatory for a proper defense of these defendants." Thereafter, Joseph A. Hayden, Esq., was substituted for Mr. Breitkopf. By order dated February 26, 1969 and filed the same date, Judge Wortendyke denied this motion, among others.

Weber now alleges that the above motion included a challenge to the Grand Jury as to its constitution regarding sex, and he should now be heard by way of an inquiry under § 2255.

The statute, 28 U.S.C. § 2255 does indeed require a hearing unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. Obviously on this ground he is not. It is obvious that the motion decided by Judge Wortendyke on the constitution of the Grand Jury was on other grounds than that of sex discrimination. The language of the motion clearly indicates this.

It is clear that the application under the *Zirpolo* decision holding was not made until called to the attention of the petitioner by the opinion itself. Indeed, an examination of the applications and orders of the Third Circuit Court of Appeals shows that this matter has been heretofore considered and rejected.

His application here is foreclosed for those reasons and under those of *Davis v. U.S.*, 411 U.S. 233 (1973). Obviously there was no prejudice to Weber by the manner in which the Grand Jury was constituted.

Weber raises other questions, most strongly that a series of trial errors taken in their totality infringes on his constitutional rights, claiming that the Third Circuit Court of Appeals has never ruled on this particular point. While it is true his attorneys never raised the accumulation of error as a point on appeal, the entire record was before the Circuit and the alleged trial errors raised by them were rejected, *United States v. Weber*, 437 F.2d 327 (3d Cir. 1970), *cert. denied* 402 U.S. 932 (1971). He cannot now raise the same issues by way of a collateral attack on his conviction.

Petitioner further contends that the jury which convicted him was not impartial. An affidavit filed by counsel shows that, "Shortly after the trial of the within matter one of the counsel for defendant was contacted by a woman who set forth several areas wherein certain jurors expressed feelings adverse to defendant."

Counsel insists that the caller could have been no one else but a juror. An examination of the record will disclose that all jurors were polled by the trial court after verdict and each affirmed the verdict itself. In *United States v. Blackburn*, 446 F.2d 1089 (5th Cir. 1971), a similar complaint was raised. The court held, however, the jury should not be exposed to post-verdict fishing expeditions in the

hope that something will turn up. That principle applies here. See also *Baker v. Hudspeth*, 129 F.2d 779 (10 Cir. 1942), *cert. denied* 317 U.S. 681 (1943). Also *United States v. Allied Stevedoring Corporation*, 258 F.2d 104, 105-06 (2d Cir. 1958), *cert. denied* 358 U.S. 841 (1958); *Medina v. United States*, 254 F.2d 228, 231 (9th Cir. 1958), *cert. denied* 358 U.S. 846 (1958).

Accordingly, I determine that there is no necessity for a hearing for the foregoing reasons, and the petition is dismissed.

Clarkson S. Fisher
United States District Judge

ADDENDUM G

District Court Order
(Filed April 29, 1974)

This matter having been opened to the Court on the Petition of Peter W. Weber, to vacate sentence imposed on September 22, 1969, and for an evidentiary hearing, pursuant to Title 28, United States Code, Section 2255, on the grounds that (1) Petitioner's constitutional rights under the Fifth Amendment were denied because women had been systematically excluded from the Grand Jury panel which returned the Indictment against him, (2) the testimony with regard to Counts I, II, and III of the Indictment against Petitioner was improperly admitted into evidence in violation of the hearsay exclusion rules and the Sixth Amendment, (3) Petitioner was substantially prejudiced by the consolidation of Counts I through V of Indictment No. 321 with Counts I through III of Indictment No. 322, (4) Petitioner was denied a trial by an impartial jury, and (5) the cumulative effect of alleged trial errors served to deny Petitioner due process of law, and the Court having considered the record of the case and the exhibits filed with the Court, and the Court having further considered the briefs and oral argument of Dino D. Bliablias, Esquire, counsel for Petitioner, and Jonathan L. Goldstein, Esquire, United States Attorney for the District of New Jersey (by Richard S. Zackin, Assistant United States Attorney for the District of New Jersey), and the Court having determined that the motion and the files and records of the case conclusively show that Petitioner is entitled to no relief.

It is on this 29th day of April, 1974,

ORDERED that the Petition of Peter W. Weber to vacate sentence be and the same is hereby dismissed, and it is further

ORDERED that the motion of Peter W. Weber for an evidentiary hearing be and the same is hereby denied, and it is further

ORDERED that the application of Peter W. Weber to present oral argument on his own behalf be and the same is hereby denied.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
JUDGE, UNITED STATES
DISTRICT COURT

I hereby consent to the
form of the within Order.

/s/ Dino D.Bliablias
DINO D. BLIABLIAS, ESQUIRE
Attorney for Peter W. Weber

ADDENDUM H

Notice of Appeal

Notice is hereby given that Peter W. Weber, Petitioner above named hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of the Honorable Clarkson S. Fisher, Judge United States District Court for the District of New Jersey denying the Petition to Vacate the Sentence of the Petitioner Peter W. Weber and further denying the Petition of Petitioner Peter W. Weber for an evidentiary hearing, entered in this action on the 29th day of April, 1974.
Dated: June 25, 1974

STEIN, BLIABLIAS and
GOLDMAN

By: /s/ Dino D. Bliablias
DINO D. BLIABLIAS
Attorney for Peter W. Weber
11 Commerce Street
Newark, New Jersey

ADDENDUM I

Order of Court of Appeals Third Circuit

JUDGMENT ORDER

After consideration of all the contentions raised by appellant, namely (1) the defendant's rights under the fifth amendment were denied because women had been systematically excluded from the grand jury panel which returned the indictment against him, (2) the appellant did not waive his constitutional right to challenge the grand jury selection procedure, (3) appellant is entitled to an evidentiary hearing under 28 U.S.C.A. section 2255, (4) appellant is not precluded from raising the constitutional issue by the doctrine of retroactivity, and (5) the cumulative effect of the many trial errors committed served to deny the appellant due process during the trial, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. *See* United States v. Zirpolo, 450 F.2d 424 (3d Cir. 1971). Each side to bear its own costs.

BY THE COURT,

/s/ M. Adams
M. ADAMS

ATTEST:

/s/ Thomas F. Quinn
THOMAS F. QUINN
Clerk

DATED: February 7, 1975

Certified as a true copy and issued in lieu
of a formal mandate on March 3, 1975.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals

No. 74-1403

In the Supreme Court of the United States

OCTOBER TERM, 1975

PETER W. WEBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1403

PETER W. WEBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erroneously denied without a hearing his motion under 28 U.S.C. 2255, in which he alleged a systematic exclusion of women from the grand jury that indicted him and a denial of due process during trial arising from a cumulation of trial errors.

Petitioner was convicted in the United States District Court for the District of New Jersey on six counts of an eight-count indictment charging violations of the Taft-Hartley Act, 29 U.S.C. 186(b), and the Hobbs Act, 18 U.S.C. 1951. He was sentenced to 10 years' imprisonment and fined $30,000. The court of appeals affirmed (437 F.2d 327), and this Court denied certiorari (402 U.S. 932).

Thereafter, petitioner filed a motion under 28 U.S.C. 2255 to set aside his conviction and sentence, contending, *inter alia*, that (1) his indictment was returned by the same grand jury that the court of appeals—subsequent to petitioner's direct appeal—found to be improperly constituted because women were systematically discriminated against in the selection process (see *United States* v. *Zirpolo*, 450 F.2d 424); and (2) he was deprived of due process of law because of a cumulation of errors during his trial. The district court denied his motion without hearing evidence (Pet. App. 12A-15A), and the court of appeals affirmed by *per curiam* order (Pet. App. 19A).

As petitioner acknowledges (Pet. 5), he filed no pretrial challenge to the array on the ground that the grand jury was unlawfully selected due to discrimination against women. His post-trial challenge was therefore untimely under Rule 12(b)(2), Fed. R. Crim. P. See *Davis* v. *United States*, 411 U.S. 233. Nor has petitioner submitted any tenable basis for distinguishing *Davis*.

His contention of a due process violation through a cumulation of trial errors was considered on direct appeal by the court of appeals, which held that, "[s]ince we have examined all the errors alleged by Weber and have found no impermissible procedures, we cannot agree that viewing the trial in its entirety reveals a deprivation of due process" (437 F.2d at 340). Since the claim was considered and rejected on direct appeal, the district court correctly denied relief without a hearing. *Kaufman* v. *United States*, 394 U.S. 217, 227, n. 8; cf. *Sanders* v. *United States*, 373 U.S. 1.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.